

**FILED**

AUG - 3 2012

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
BY DEPUTY

**In re: Groupon Marketing AND  
SALES PRACTICES LITIGATION**

**Case No.: 3:11-md-02238-DMS-RBB**

**OBJECTION TO PROPOSED  
SETTLEMENT, OBJECTION  
TO ATTORNEYS' FEES REQUEST**

To The Honorable District Judge:

Comes Now Warren Sibley, Tracy Klinge, Jordon Echols and Kimberly M. Cogbill ("Objectors"), and files these Objections to the Proposed Settlement, Objection to Attorneys' Fees, and would show as follows:

**1. Objectors are class member.**

Objector(s) declares that the following statements are true and correct:

(a) Warren Sibley, Tracy Klinge, Jordon Echols and Kimberly M. Cogbill are all members of the class.

(b) We purchased a Groupon certificate and have each received an e-mail notice that we are members of the class.

(c) We object to the Settlement styled *In Re: Groupon Marketing and Sales Practices Litigation*.

**2. Objection to Class Notice.**

The Federal Judicial Center, <http://www.fjc.gov/> has a specific section entitled "Judge's Class Action Notice and Claims Process Checklist and Plain Language Guide

1 2010,” which suggests a percent of class to be reached by notice at between 70-95%.

2 This only notice to be given to class members is by e-mail. While the settlement  
3 website contains much information on the Motion for Attorney Fees it contains little  
4 other useful information. There is no indication of the number of class members or how  
5 many email notifications have been sent or number returned. Items the Court should  
6 consider include:  
7

8 Is the notice plan conducive to reaching the demographics of the class?

9 Answer: Cannot tell because we have no information on how many emails have  
10 been sent or how many were returned  
11

12 Is the coverage broad and fair? Does the plan account for mobility?

13 Answer: From the documents available to the class members we don't know and  
14 we do not know how the notice plan takes into account changed email accounts.  
15

16 Does the plan include individual notice?

17 Answer: Only through emails

18 If names and addresses are reasonably identifiable, Rule 23(c)(2) requires  
19 individual notice. The question that the Court should address during the Fairness.  
20

21 Did the Court receive reliable information on whether and how much individual  
22 notice can be given?

23 Answer: From the documents available to the class members we don't know.

24 The Federal Judicial Center cautions the Court to be careful to look closely at  
25 assertions that mailings are not feasible. The lynchpin in an objective determination of  
26 the adequacy of a proposed notice effort is whether all the notice efforts together will  
27 reach a high percentage of the class. It is reasonable to reach between 70–95%. A study  
28

1 of recent published decisions showed that the median reach calculation on approved  
2 notice plans was 87%.

3 Will this standard be met?

4 Answer: At this stage of the proceedings we don't know

5 In a world of computer spam and computer spam filters, important notices such as  
6 "you are a member of a class action," may go unread or unopened.  
7

8 The Notice plan is questionable and additional information is necessary.  
9

10 **3. Objections to the Settlement.**

11 The settlement is not fair, reasonable or adequate and Objector objects to  
12 the proposed settlement for the following reasons:

13 It is likely that this may turn out to be nothing more than a coupon settlement by  
14 another name or a *cy pres* settlement.

15 The claims form is needless complex and will discourage class members from  
16 filing claims. The problem is the requirement in the claim form to include a voucher  
17 number this will discourage claimants as class members may easily have discarded the  
18 voucher.  
19

20 While it is possible to obtain a Cash Refund after jumping through numerous  
21 hoops it is unlikely that more than a handful of class members will ever receive a cash  
22 refund for their purchase. The result is a product voucher a/k/a a coupon only good for a  
23 limited time.  
24

25 This Court should heed the Managing Class Litigation: A Pocket Guide for  
26 Judges' admonition in "5 Appraisal of Settlement" that cautions:  
27  
28

1        “Your appraisal of the settlement should focus on the value actually  
2        distributed to the class based on the number and percentage of class  
3        members who have filed a claim. As discussed below in Section IV. C.4,  
4        strict eligibility requirements and claims procedures often discourage class  
5        claims and might reduce the total amount paid to class members, making  
6        the stated value of the settlement fund illusory.”

7        The Settlement Vouchers because smacks of a sales promotion, as the settlement  
8        compels a class member to continue doing business with the same company that engaged  
9        in unlawful conduct in order to receive any benefit. The tortfeasor profits from the  
10       settlement as proposed.

11       There is no reasonable rationale for the expiration of the coupons. The waiver  
12       class members provide to Defendant does not expire, so neither should the consideration  
13       class members receive expire. Given the time value of money, the value of the certificate  
14       goes down the longer the class member holds it, so Defendant would not be harmed.  
15       Since class members are permanently losing their rights, they should be allowed to use  
16       the certificate when they are ready to make a purchase and not within the artificial time  
17       limits set by the settling parties. Equity demands a quid pro quo. The coupons should be  
18       perpetual or at least good for one year. The Defendant has had the use of the class  
19       members money for the time period of the settlement.  
20

21       The present structure of the settlement is essentially a sales promotion that  
22       benefits Defendant at the expense of class members’ rights. To the extent class members  
23       do not use the settlement vouchers, Defendant benefits. To the extent class members use  
24       the settlement vouchers, Defendant as well as the merchants benefits from the possibility  
25       of extra sales. Thus, the settlement is structured to benefit Defendant, as well as Class  
26       Counsel, at the expense of class members who lose their rights against the Defendant.  
27  
28

1 **4. Injunctive Relief.**

2 The supposed benefit to the class is in the form of an Agreed Injunction. In the  
3 Agreed Injunction, Defendant does no more than agree to follow current law and not  
4 misrepresent its services; this is required of Defendant under current law. The injunctive  
5 relief includes changes to the label of the voucher and a 3 year limitation on the  
6 expiration dates of vouchers, Settlement Agreement pg. 15-16.

7  
8 A Court should consider the following factors that a Court, in granting approval to  
9 a class settlement, when considering injunctive relief settlements, the court should review  
10 the settlement and consider the following:

- 11  
12 (1) How much is the injunction worth to the class as a practical matter?  
13 (2) What is the real cost to Defendant?  
14 (3) Does the injunction do anything more than restate the obligation that  
15 Defendant has under existing law?  
16

17 Objectors would submit that the answers to the listed above are:

- 18 (1) Very little.  
19 (2) Very little  
20 (3) No  
21

22 Considering what the class is being asked to give up, and what little benefit the  
23 class will receive, the Court should reject the purposed settlement.

24 **5. Is *Cy Pres* Appropriate?**

25 It is possible that this may a *Cy pres* settlement based on a poor reaction  
26 from the class and not just a \$75,000 component in class action settlement *Cy*  
27  
28

1 *Pres* awards have increased since the earliest reported use of a *cy pres* award in  
 2 *Miller v. Steinbach*, 1974 WL 350 at \*2 (S.D. N.Y. Jan. 3, 1974).

3 The term originates from the French phrase -- *cy pres comme possible* -- which  
 4 translates “as near as possible.” The term/concept has been a part of American  
 5 jurisprudence for years but was generally limited to estates and trusts. The concept has  
 6 experienced a rapid expansion in class action litigation as a means of disposing of  
 7 unclaimed class awards and settlements. There are other methods or general theories as  
 8 to distribution of unclaimed awards:  
 9

- 10 (1) distribution of unclaimed awards to class members who submitted claims;
- 11 and
- 12 (2) escheat the remainder to the state.<sup>1</sup>

13 The problem of distributing class funds to third party charities that have little or  
 14 no connection to the class members was first considered in the frequently cited case of  
 15 *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990). The  
 16 problem, as that court noted, was that the benefit was given to a group too far removed  
 17 from the class and suggested that if *cy pres* was used, it should be to the next best  
 18 distribution.  
 19

20 Here, the proposed settlement attempts to distribute the funds to the Electronic  
 21 Frontier Foundation and the Center for Democracy and Technology. What if any  
 22 connection these organizations have with the class is not mentioned. The fact remains  
 23 that *cy pres* awards, the best that can be said for a *cy pres* award in this situation is that it  
 24  
 25  
 26  
 27  
 28

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<sup>1</sup> *Cy Pres, a Not So Charitable Contributor to Class Action Practice*, John Beisner, 2d Edition, 2010, p. 8. It is possible

1 might make a class member feel good to give the Defendants' money to someone else.  
2 This is different than compensating the class for the Defendants' wrongdoing.

3  
4 The Court in its role as a fiduciary should carefully review the intended *cy pres*  
5 recipients for any relationship with any class representatives, class counsel, the  
6 Defendants and their attorneys. Any relationship between the parties or their attorneys  
7 with the recipient should be grounds for disqualification of the intended recipient. This  
8 could be readily accomplished by the Court requiring a Disclosure Statement. In  
9 addition, to avoid any ethical issues, no recipient of a *cy pres* award should have a  
10 relationship with the Judge.  
11

12 **6. Class Counsel's Requested Attorney Fees are Unreasonable Because the**  
13 **Value of the Settlement to the Class is Impermissibly Overstated.**

14  
15 Objectors believes that a ruling on the fee petition should be deferred until after  
16 the date for filing for the settlement vouchers, at a minimum so that the Court can judge  
17 the classes' response. If the Court approves the claims period as suggested by the parties  
18 then the Court should defer awarding at least a portion of the attorneys' fees until the  
19 expiration of the period to file a claim. (b) Objectors object to the attorneys' fees award  
20 in this case because it amount to unjust enrichment. Although 25% is a 'benchmark,' in  
21 this Circuit the actual recovery should depend on the work expended, the time consumed  
22 and the results obtained. "Any single rate, however, is arbitrary and cannot capture  
23 variations in class actions' valuations." *Manual for Complex Litigation*, Fourth §14.11,  
24 p. 184).  
25

26  
27 It is incumbent on the court to make this decision in a common fund case. The  
28 case has been settled early in the process and the Court, serving as a fiduciary for the

absent class, must critically examine class counsel's application and award no more than what is absolutely required to provide reasonable compensation to class counsel. While 25% of the common fund for attorneys' fees is the accepted starting point in this Circuit, the District court can depart from that standard. The District Court may exercise its discretion to choose between the Lodestar method and percentage method in calculating fees. See *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

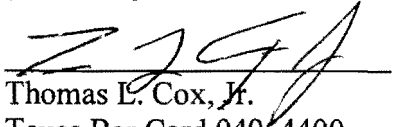
Class Counsel in their fee petition state that the actual amount being sought is less than their lodestar, which clearly indicates that this settlement is intended to clearly benefit Class Counsel over the class because of their concern that Defendant would prevail.

**6. Joinder in Other Objections.**

This Objector adopts and joins in all other well taken – bona fide objections filed by other Class Members in this case, and incorporates them by reference as if they appeared in full herein.

**7. Relief.**

Wherefore, Objector prays that the Court deny the proposed settlement, deny approval of the settlement class, deny the requested fees to Class Counsel and grant Objector such other and further relief as to which Objector may be entitled.

  
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**CERTIFICATE OF SERVICE**

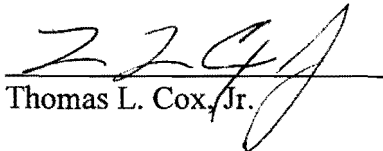
I hereby certify that a copy of the above and foregoing document has been served according to the instructions in the notice on July 5, 2012, to the following:

With a copy to:

United States District Court  
For the Southern District of  
California  
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